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No. 314.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

FAIRMOUNT GLASS WORKS,
Petitioner,

v.

CUB FORK COAL COMPANY AND PARAGON COLLIERY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, WITH SUPPORTING BRIEF.

HENRY H. HORNBROOK,
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ALBERT P. SMITH,
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KURT F. PANTZER,
ERNEST R. BALTZELL,
Of Counsel.

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FAIRMOUNT GLASS WORKS,
Petitioner,
v.
CUB FORK COAL COMPANY AND PARAGON COLLIERY COMPANY,
Respondents.

No. ————.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, WITH SUPPORTING BRIEF.

May it Please the Court:

The petition of Fairmount Glass Works respectfully presents to this Honorable Court:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This was an action at law for damages for an alleged breach of an instalment contract for the purchase and sale of coal, brought in the United States

District Court for the Southern District of Indiana by respondents, sellers, corporations of West Virginia, against petitioner, buyer, a corporation of Indiana (R. 2-11). Petitioner answered by denial (R. 31), counterclaim (R. 21-24), and certain affirmative defenses (R. 31-37). Of these defenses, at least one, paragraph V alleging misrepresentation (R. 35-36), was for the jury by express direction on a previous appeal. *Cub Fork Coal Co. v. Fairmount Glass Works*, 33 Fed. (2d) 420. At the last trial evidence on this issue was "similar" (R. 153). The issues were submitted to a jury which returned a verdict for respondents in the sum of One Dollar (R. 38). Respondents moved to set aside the verdict and for a new trial, which motion the trial court overruled (R. 38, 130), and entered judgment on the verdict (R. 39).

On respondents' appeal to the Circuit Court of Appeals for the Seventh Circuit, that court reversed the judgment of the District Court (R. 155-156), on the *sole ground* that "the verdict should have been set aside and a new trial ordered on appellants' (respondents') motion," assigning as reason that "on any hypothesis appellants were entitled to recover over $18,000.00." (R. 153-154.)

No error was found in any ruling or instruction of the court prior to verdict. In directing reversal it was assumed that the jury had correctly determined in respondents' favor every issue except that as to the amount of damages, and the new trial ordered was limited to the issue of damages. (R. 153.)

This petition seeks a review of the above mentioned judgment of the Circuit Court of Appeals for the Seventh Circuit. The opinion is found in the record at pages 152 to 155. It is not yet published.

II.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

First: By said decision, the Circuit Court of Appeals for the Seventh Circuit, has assumed to reexamine the verdict of a jury otherwise than according to the rules of the common law, in conflict with Article 7 of the Articles in Amendment of the Constitution of the United States, as interpreted by this Court, and in conflict with the following applicable decisions of this Court.

Parsons v. Bedford, (1830) 3 Peters 433, 447-448;
Railroad Co. v. Fraloff, (1879) 100 U. S. 24, 31;
Wilson v. Everett, (1890) 139 U. S. 616, 621;
Chicago, Burlington & Quincy Railroad Co. v. Chicago, (1896) 166 U. S. 226, 246.

Second: By assuming to reverse a judgment at law rendered by a Federal Court for alleged error in overruling a motion for a new trial, said Circuit Court of Appeals for the Seventh Circuit has rendered

a decision in conflict with the following applicable decisions of this Court, viz.:

Marine Ins. Co. v. Young, (1809) 5 Cranch 187;
Barr v. Gratz's Heirs, (1819) 4 Wheaton 213;
Zacharie v. Franklin, (1838) 12 Peters 151, 163;
Browne v. Clark, (1845) 4 How. 4, 15;
Doswell v. De La Lanza, (1857) 20 How. 29, 32;
Warner v. Norton, (1857) 20 How. 448, 461;
Pomeroy's Lessee v. Bank of Indiana, (1863) 1 Wall. 592, 593-594;
Mills v. Smith, (1868) 8 Wall. 27, 32;
Holder v. United States, (1893) 150 U. S. 91, 92.

Third: By assuming to reverse a judgment at law rendered by a Federal Court upon the verdict of a jury solely because of alleged error of fact in the verdict and alleged error of the trial court in overruling a motion for new trial, said Circuit Court of Appeals for the Seventh Circuit has rendered a decision in conflict with the following decisions of other Circuit Courts of Appeals, viz.:

Miller v. Maryland Casualty Co., (2nd C. C. A., 1930), 40 Fed. (2d) 463;
Keith v. Abrams, (3rd C. C. A., 1930), 43 Fed. (2d) 557;
J. W. Bishop Co. v. Shelhouse, (4th C. C. A., 1905), 141 Fed. 643;

Chicago, M. & St. P. Ry. Co. v. Heil, (8th C. C. A., 1907), 154 Fed. 626, 629;
American Trading Co. v. North Alaska Salmon Co., (9th C. C. A., 1918), 248 Fed. 665.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify to this Court for its review and determination, on a day certain to be therein named, all proceedings in the case numbered and entitled on its docket No. 4554, *Cub Fork Coal Company and Paragon Colliery Company, Appellants vs. Fairmount Glass Works, Appellee*, and that the judgment of said Circuit Court of Appeals therein be reversed by this Honorable Court and the judgment of the District Court of the United States for the Southern District of Indiana be affirmed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may be meet and just, and your petitioner will ever pray.

FAIRMOUNT GLASS WORKS,

By HENRY H. HORNBROOK,
Attorney for Petitioner.

CHARLES REMSTER,
ALBERT P. SMITH,
PAUL Y. DAVIS,
KURT F. PANTZER,
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Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is found in the Record at pages 152-155. It has not yet been published.

II.

JURISDICTION.

The date of the conditional judgment of the Circuit Court of Appeals was June 4, 1932. (R. 155-156.) Final judgment of reversal was rendered July 9, 1932, (R. 156). The decision affirms that part of the verdict determining petitioner's liability, and limits the new trial ordered to the single issue of damages (R. 156-157).

III.

STATEMENT OF THE CASE.

Almost all essentials necessary to a consideration of this petition are set out in the petition under the "Summary Statement" (Petition, p. 1). As there pointed out, the issue of misrepresentation submitted to the jury (R. 118-119) under the express mandate of a previous appeal (33 Fed. (2d) 420) would have

authorized the jury to find a verdict for petitioner. For supporting evidence see R. 73, 75, 76-77.

It is believed that a discussion of the evidence as to damages is irrelevant. The issue of damages was submitted to the jury (R. 121).

IV.

ASSIGNMENTS OF ERROR.

The assignments of error are set forth in the petition under the heading of "Reasons Relied on for Allowance of the Writ" (Petition, pp. 3-5).

V.

SUMMARY OF ARGUMENT.

ONE.

By the decision in question, facts tried by a jury have been "reexamined otherwise than according to the rules of the common law" in violation of the Seventh Amendment, as interpreted by this Court.

TWO.

The decision in question also conflicts with the practice settled by many decisions of this Court applying this principle, to the effect that a trial court's action in overruling a motion for new trial is not reviewable for error of fact in an appellate court of the United States.

THREE.

The decision also conflicts with decisions of the Circuit Courts of Appeals of the Second, Third, Fourth, Eighth and Ninth Circuits, denying the power of an appellate court to reexamine facts tried by a jury.

ARGUMENT.

ONE.

By the decision in question facts tried by a jury have been "reexamined otherwise than according to the rules of the common law" in violation of the Seventh Amendment, as interpreted by this Court.

While this appellate proceeding was denominated an "appeal," pursuant to Act of 1928 as amended, it was governed by the same limitations as formerly governed writs of error (U. S. C. A., Title 28, Sec. 861b).

The action of the Circuit Court of Appeals in the present case is apparent from the opinion, without elaboration. No error was found in any proceeding of the trial court prior to verdict. The Appellate Court *examined the evidence*, concluded that the jury had made an *error of fact* in assessing the amount of respondent's recovery, and reversed the case *solely because the trial court had refused to set aside this verdict and award a new trial.* It is submitted that this constitutes the *reexamination* of facts tried by a jury *otherwise* than according to the rules of the common law, which is expressly forbidden by the Seventh Amendment.

The Seventh Amendment reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The effect of the phrase "no fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of the common law," was early established by this Court in its opinion in *Parsons v. Bedford*, 3 Peters 433, an opinion written by Mr. Justice Story in 1830. The outstanding legal scholarship of Justice Story makes it unnecessary to cite other authority for an exposition of the manner in which facts "tried by a jury" might be reexamined "according to the rules of the common law." Furthermore at that time the conception of trial by jury which had led to the adoption of the Seventh Amendment, was not matter merely of recorded history but of living memory, in the minds of the bar and of the Bench of this Court. The opinion in *Parsons v. Bedford* is therefore entitled to conclusive weight as determining the effect of this provision of the Constitution.

The Court said:

> "But the other clause of the amendment is still more important, and we read it as a substantial and independent clause. 'No fact tried by a jury shall be otherwise re-examinable, in any court of the United States, than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened the proceedings. The

Judiciary Act of 1789, c. 20, Section 17, has given to all the courts of the United States 'power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.' And the appellate jurisdiction has also been amply given by the same act (Sections 22, 24) to this court, to redress errors of law; and for such errors to award a new trial, in suits at law which have been tried by a jury.

* * *

"The terms of the present act may well be satisfied by limiting its operation to modes of practice and proceedings in the court below, without changing the effect or conclusiveness of the verdict of the jury upon the facts litigated at the trial. Nor is there any inconvenience from this construction; for the party has still his remedy, by a bill of exceptions, to bring the facts in review before the appellate court, so far as those facts bear upon any question of law arising at the trial; and if there be any mistake of the facts, the court below is competent to redress it, by granting a new trial.

"Our opinion being that, if the evidence were now before us, it would not be competent for this court to reverse the judgment for any error in the verdict of the jury at the trial; the refusal to allow that evidence to be entered on the record is not matter of error, for which the judgment can be reversed."

Per Story, J., in *Parsons v. Bedford*, 3 Peters 433, 447-448, 449-450.

The principle has been many times reaffirmed. In *Railroad Company v. Fraloff*, (1879) 100 U. S. 24, a jury had returned a verdict for $10,000 for the value of baggage allegedly necessary to the personal use of a passenger which had been lost by a carrier. One

of the errors assigned called in question the reasonableness of a verdict that articles of such great value were proper baggage. The Court said:

> "No error of law appearing upon the record, this court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefore rested with the court below, under its general power to set aside the verdict. But that court finding that the verdict was abundantly sustained by the evidence, and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict, and overruled a motion for new trial. Whether its action, in that particular was erroneous or not, our power is restricted by the Constitution to the determination of the question of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties."

In *Wilson v. Everett*, (1890) 139 U. S. 616, it clearly appeared from the evidence that the plaintiff was either entitled to recover $5,000 or $15,000, or nothing, but the jury returned a verdict for $10,000. Among the errors assigned was the refusal of the trial court to set aside this verdict. In passing upon this question, the Court said:

> "The principal ground of complaint by the defendant seems to be that the jury had no basis for finding a verdict for $10,000, but that their

> verdict should have been for either $5,000 or $15,000. But this was a question to be reached only through a motion for a new trial; and we cannot, on this writ of error, review any error committed in that respect by the jury, if there were one. Nor can we take cognizance of the complaint that the court overruled the motion for a new trial, or that the verdict of the jury was contrary to law and not warranted by the testimony. The case was fairly submitted to the jury, and the issues involved were passed upon by them."

In *Chicago, Burlington and Quincy Railroad v. Chicago*, (1896) 166 U. S. 226, 246, this Court had before it a jury verdict for one dollar, awarded as compensation for the taking of real property by eminent domain. This verdict was attacked as grossly inadequate under the evidence. Among other things, it appeared, as stated by Mr. Justice Brewer, dissenting, that the owners of similar tracts adjoining had been awarded five thousand dollars. Nevertheless, the majority of the Court, speaking through Mr. Justice Harlan, emphatically disclaimed its power, as an appellate court, to reexamine the facts tried by the jury.

The Court said:

> "Upon the reasoning in the case just referred to, it would seem to be clear that the last clause of the Seventh Amendment forbids the retrial by this court of the facts tried by the jury in the present case.
>
> * * *
>
> "The persons empanelled in this case to ascertain the just compensation due to the railroad company constituted a jury as ordained

by the constitution of Illinois in cases of the condemnation of private property for public use, and, being a jury within the meaning of the Seventh Amendment of the Constitution of the United States, the facts tried by it cannot be retried 'in any court of the United States otherwise than according to the rules of the common law.' The only modes known to the common law 'to reexamine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo* by an appellate court, for some error of law which intervened in the proceedings.' *Parsons v. Bedford*, 3 Pet. 433, 447, 448; *Railroad Co. v. Fraloff*, 100 U. S. 24, 31.

"To this may be added that Congress has provided that the final judgment of the highest court of a State in cases of which this court may take cognizance, shall be reexamined upon writ of error, a process of common law origin, which removes nothing for reexamination but questions of law arising upon the record. *Egan v. Hart*, 165 U. S. 188. Even if we were of opinion in view of the evidence that the jury erred in finding that no property right, of substantial value in money, had been taken from the railroad company, by reason of the opening of a street across its right of way, we cannot, on that ground, reexamine the final judgment of the state court. We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation."

166 U. S. 244, 245-246.

It is submitted therefore, that in assuming in the present case to examine the evidence and to determine

therefrom that "on any hypothesis appellants were entitled to recover over $18,000," and to reverse the judgment because "the verdict should have been set aside and a new trial ordered on appellants' motion," the Circuit Court of Appeals of the Seventh Circuit usurped a power clearly denied it by the Seventh Amendment.

Two.

The decision in question also conflicts with the practice settled by many decisions of this Court applying this principle, to the effect that a trial court's action in overruling a motion for new trial is not reviewable for error of fact in an appellate court of the United States.

Only a few of the many decisions of this Court so deciding are cited below. Further comment is unnecessary.

Marine Ins. Co. v. Young, (1809) 5 Cranch 187;
Barr v. Gratz's Heirs, (1819) 4 Wheaton 213;
Zacharie v. Franklin, (1838) 12 Peters 151, 163;
Browne v. Clark, (1845) 4 How. 4, 15;
Doswell v. De La Lanza, (1857) 20 How. 29, 32;
Warner v. Norton, (1857) 20 How. 448, 461;
Pomeroy's Lessee v. Bank of Indiana, (1863) 1 Wall. 592, 593-594;
Mills v. Smith, (1868) 8 Wall. 27, 32;
Holder v. United States, (1893) 150 U. S. 91, 92.

THREE.

The decision also conflicts with decisions of the Circuit Court of Appeals of the Second, Third, Eighth and Ninth Circuits, denying the power of an appellate court to reexamine facts tried by a jury.

Following are some, not all, of the cases in which Circuit Courts of Appeals of other circuits have refused to *reexamine* facts tried by juries, or to consider alleged errors of fact arising upon rulings upon motion for new trial:

Miller v. Maryland Casualty Co., (2nd C. C. A., 1930), 40 Fed. (2d) 463;
Keith v. Abrams, (3rd C. C. A., 1930), 43 Fed. (2d) 557;
J. W. Bishop Co. v. Shelhorse, (4th C. C. A., 1905) 141 Fed. 643;
Chicago, M. & St. P. Ry. Co. v. Heil, (8th C. C. A., 1907), 154 Fed. 626, 629;
American Trading Co. v. North Alaska Salmon Co., (9th C. C. A., 1918), 248 Fed. 665.

Cases apparently contrary, some of which are cited in support of the decision in the instant case, are analyzed by Judge Learned Hand in the case of *Miller v. Maryland Casualty Company, supra.* Speaking of instances in which appellate courts appear to have reversed for error of fact, he says:

> "However, so far as we have found, all the actual decisions except one, when this has been done, are either where the jury gave nominal

> damages, that is, where they did not attempt to appraise the plaintiff's loss at all; where their verdict was less than the amount of the loss which the defendant did not dispute; or where damages were not involved. In the first class is *Pugh v. Bluff City Excursion Co.*, 177 F. 399 (C. C. A. 6). In the second are *Glenwood Irrigation Co. v. Vallery*, 248 F. 483 (C. C. A. 8); *United Press Association v. National Newspapers Association*, 254 F. 284 (C. C. A. 8); and *Stetson v. Stindt*, 279 F. 209 (C. C. A. 3). In the third are *James v. Evans*, 149 F. 136 (C. C. A. 3), and *Frye v. Lyon*, 299 F. 926 (App. D. C.). All these are within the limits suggested in *Southern Ry Co. v. Bennett*, and the exception, *Cobb v. Lepisto*, (C. C. A.) 6 F. (2d) 128, (C. C. A. 9), so far as we can find stands alone."

It is believed that none of the cases discussed by Judge Hand, except *Cobb v. Lepisto*, (9th C. C. A., 1925), 6 Fed. (2d) 128, supports the action taken in the present case.

The supposed power to reexamine a verdict for nominal damages, for which is cited *Pugh v. Bluff City Excursion Co.*, (6th C. C. A., 1910), 177 Fed. 399, is negatived by the decision of this Court in *Chicago, Burlington and Quincy Railroad v. Chicago*, (1896), 166 U. S. 226, 246, discussed above.

Moreover, *Pugh v. Bluff City Excursion Co.* is not in fact such a case, since the Circuit Court of Appeals really reversed on account of the failure of the trial judge to give a more positive instruction against an award of nominal damage when the jurors inquired whether they might return such a verdict.

It is submitted further that the present case is not a true case of nominal damages; since if proper to speculate upon the deliberations of the jury, it is proper to assume that the one dollar represents the result of subtracting a substantial award on the counterclaim from a substantial award on the complaint.

The reason given in support of decisions of the second class cited by Judge Hand is illustrated by *Glenwood Irrigation Co. v. Vallery*, (8th C. C. A., 1918), 284 Fed. 484, where the trial judge had refused to set aside a verdict less than the amount of undisputed damages for which he had positively directed a verdict. The Court said:

> "No issue was submitted to the jury as to the amount of plaintiff's recovery. They were confined by the charge to determining defendant's liability for the fire. It is manifest, therefore, that the amount of the damages was not 'a fact tried by the jury,' within the meaning of the Seventh Amendment to the Federal Constitution."

Whether or not this reasoning be sound, it does not justify the reversal in the instant case, where the amount of recovery was sharply controverted and was submitted to the jury.

The case of *Stetson v. Stindt*, (3rd C. C. A., 1922) 279 F. 209, placed by Judge Hand in the same category and cited by the Court in the instant case, is chiefly noteworthy for the fact that of the sixteen cases cited by the Circuit Court of Appeals for the Third Circuit in support of its ruling, all but one were

from state courts not governed by the Seventh Amendment. The one Federal case was a decision of Mr. Justice Story at *nisi prius*, where he exercised his power as a trial judge, "according to the rules of common law," to set aside a verdict as against the evidence. It affords no support for such action by an Appellate Court.

The case of *James v. Evans*, (3rd C. C. A., 1906) 149 Fed. 136, should not really appear here at all, as the Appellate Court in that case reversed because the trial court had set aside a verdict. The Court did not reexamine the facts tried by the jury but the *facts tried by the court*, and the reversal directed that judgment be entered on the verdict.

One further case, cited by the Circuit Court of Appeals for the Seventh Circuit in support of its action in the present case, deserves mention. *Smith v. United States*, (4th C. C. A., 1922) 281 Fed. 696, was a criminal case. The Fifth Amendment which, rather than the Seventh, is applicable to criminal jury trials, contains no such limitation upon the power of appellate courts as the Seventh Amendment. Consequently no constitutional limitation prohibited the action of that court in setting aside a verdict of conviction as against the evidence.

It is believed that the confusion as to the power of an appellate court to "reexamine facts tried by a jury" evidenced by the decisions above cited, is alone sufficient to warrant the issuance of a writ of certiorari in this case. While decisions of this Court seem clearly to have denied the power which was as-

sumed by the Circuit Court of Appeals of the Seventh Circuit in rendering the decision now in question, the fact that that court conceived its action warranted by decisions of other Circuit Courts of Appeals (including one rendered in a criminal case) indicates that the true rule is frequently misapprehended and that Circuit Courts of Appeals not infrequently fall into the same error as did counsel in *Mills v. Smith*, 8 Wall. 27, 32, where Mr. Justice Grier said:

> "The counsel, in their arguments in this case, seem to have forgotten that this court have no right to order a new trial because they may believe that the jury may have erred in their verdict on the facts. If the court below have given proper instructions on the questions of law, and submitted the facts to the jury, there is no further remedy in this court for any supposed mistake of the jury."

Involving, as it does, the application of what Mr. Justice Story denominates the "more important" part of the fundamental guaranty of jury trial found in the Seventh Amendment, this petition presents a subject matter which should be placed beyond further question by a decision of this Court.

Respectfully submitted,

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